

National Labor Relations Board



Weekly Summary of NLRB Cases

Division of Information

Washington, D.C. 20570

Tel. (202) 273-1991

February 11, 2005

W-2986

CASES SUMMARIZED
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Press Releases ([R-2554](#)): NLRB Improves Legal Research Capability of its Web Site

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Cheney Construction, Inc. (17-CA-22517; 344 NLRB No. 9) Manhattan, KS Feb. 4, 2005. In agreement with the administrative law judge, the Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to consider for hire and failing and refusing to hire three applicants because of their membership in, or support for Teamsters Local 918, or any other labor organization, and by processing union supporters' employment applications differently from the application of other individuals. [\[HTML\]](#) [\[PDF\]](#)

Consistent with *Dean General Contractors*, 285 NLRB 573 (1987), the judge ordered reinstatement and backpay for three discriminatees. While Chairman Battista and Member Schaumber recognize that *Dean General* represents current Board law, they are concerned as to whether that case was correctly decided. Accordingly, they left to compliance the issue of how long these employees, if they had not been discriminated against, would have remained employees of the Respondent because that will determine the amount of backpay and whether reinstatement continues to be appropriate. See *Quantum Electric, Inc.*, 341 NLRB No. 146 (2004).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Carpenters Local 918; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Manhattan on May 4, 2004. Adm. Law Judge Albert A. Metz issued his decision Sept. 9, 2004.

Fedex Freight East, Inc. (13-CA-40188; 344 NLRB No. 5) Chicago Heights, IL Jan. 31, 2005. The Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Tommy Grass. It also agreed with the judge that the Respondent knew of Grass' union activities and that its decision to suspend and discharge Grass was motivated by antiunion animus. In concluding that the Respondent violated the Act, the Board wrote that it did so solely by application of *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 898 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983). [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Tommy Grass, an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Chicago, May 19-20, 2003. Adm. Law Judge David L. Evans issued his decision July 22, 2003.

Laborers (Eshbach Brothers, LP) (4-CD-1129-1; 344 NLRB No. 4) Reading, PA Jan. 28, 2005. The Board concluded that the employees of Eshbach Brothers, LP, represented by Laborers instead of employees represented by Operating Engineers Local 542, are entitled to perform the operation of the rough terrain forklifts necessary for the masonry project at Central Bucks High

School construction site located in Bucks County, Pennsylvania. In making the award, the Board relied on the factors of collective-bargaining agreements, employer preference and past practice, and economy and efficiency of operations. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Schaumber participated.)

Lancaster Nissan, Inc. (4-CA-32498, 32862; 344 NLRB No. 7) East Petersburg, PA Jan. 31, 2005. The Board affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to meet with Machinists Lodge 98 for negotiations at reasonable times; failing and refusing to provide necessary and relevant information to the Union; withdrawing recognition of the Union as the collective-bargaining representative of the unit employees; and unilaterally implementing changes in the working conditions of the unit employees without notice to the Union or affording the Union the opportunity to bargain about the changes. [\[HTML\]](#) [\[PDF\]](#)

While he agreed with his colleagues that the Respondent failed to meet at reasonable times for bargaining, Member Schaumber believed that in her analysis of this issue, the judge should have considered whether the Union fully satisfied its bargaining obligation when it insisted on the presence at bargaining sessions of two unit employees from the small bargaining unit, thus requiring that bargaining sessions be limited to evenings and weekends, and when it failed to request bargaining during business hours on those days when at least one of these bargaining unit employees was available for bargaining. However, Member Schaumber found that the evidence as a whole supports the judge's conclusion.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Machinists Lodge 98; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Philadelphia, April 13-14, 2004. Adm. Law Judge Jane Vandeventer issued her decision Sept. 30, 2004.

MetFab, Inc. (16-CA-23533, et al., 16-RM-763; 344 NLRB No. 6) Houston, TX Jan. 31, 2005. In affirming the administrative law judge's findings, the Board held that the Respondent violated Section 8(a)(1) of the Act by threatening employees that the Respondent would shut its doors if they voted in favor of Sheet Metal Workers Local 54; by offering employees improved benefits to encourage them to vote against the Union; by creating the impression among employees that their union activities were under surveillance; and by interrogating employees regarding their union sympathies. [\[HTML\]](#) [\[PDF\]](#)

The Board also adopted the judge's recommendations that the challenges to the ballots of Gary Jones and Roger Reid be sustained, that the challenge to the ballot of Raymond Castillas be overruled, and that a certification of results of election be issued in Case 16-RM-763. The tally of ballots for the election of March 26, 2004, showed that 5 votes were for and 6 were against the Union, with 3 determinative challenged ballots.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Sheet Metal Workers Local 54; complaint alleged violation of Section 8(a)(1). Hearing at Houston, Aug. 16 and 17, 2004. Adm. Law Judge Michael A. Marcionese issued his decision Sept. 30, 2004.

Pacific Bell Telephone Co. d/b/a SBC California (21-CA-36096; 344 NLRB No. 11) San Francisco, CA Feb. 4, 2005. Chairman Battista and Member Schaumber affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide Communications Workers Local 9509 with the following relevant information: (1) the F&T orders (customer service requests) allegedly falsified by discharged employees; (2) the notes made in the Respondent's computer program (BOSS notes) for each of the F&T orders allegedly falsified; and (3) the asset protection (internal security) report regarding Supervisor Kelly Miragliotta, who supervised some of the discharged employees and who was discharged at about the same time for problems related to F&T sales' code falsification. Member Liebman did not participate in the decision on the merits. [\[HTML\]](#) [\[PDF\]](#)

The Respondent claimed that the requested information contained confidential information, i.e., customer names, addresses, telephone numbers, and services provided to customers. Even assuming that the Respondent had established a legitimate and substantial confidentiality interest in that information, Chairman Battista and Member Schaumber agreed with the judge that the Respondent made no offer of accommodation. The Respondent also asserted that the Union's request for information should be deferred to the parties' contractual grievance-arbitration procedures. Chairman Battista and Member Schaumber wrote that if not bound by Board precedent, they would defer the request. However, in the absence of a three-member Board majority to overrule current Board law, they find that the judge correctly applied the Board's policy of nondeferral in information request cases.

(Chairman Battista and Member Schaumber participated.)

Charge filed by Communications Workers Local 9509; complaint alleged violation of Section 8(a)(1) and (5). Hearing at San Diego on Aug. 2, 2004. Adm. Law Judge Lana H. Parke issued her decision Sept. 23, 2004.

Southern California Gas Co. (31-CA-26454; 344 NLRB No. 8) Los Angeles, CA Feb. 3, 2005. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to furnish Utility Workers Local 483 with the information requested on June 17, 2003, concerning operator-qualification and certification plans applicable to nonrepresented contractor employees. [\[HTML\]](#) [\[PDF\]](#)

The Union, in its request for information, asked the Respondent for its most recent list of contractors maintaining an operator-qualification plan, explaining that the information was relevant to the Union's administration of the collective-bargaining agreement as it related to the safety of unit employees. In making his findings, the judge relied on: (1) evidence that a substantial majority of the Respondent's contractors lacked an operator-qualification plan; (2) evidence that contractor employees were unfamiliar with operator-qualification requirements; and (3) worksite accidents that occurred in June 2002 and July 2003. In adopting the judge's decision, the Board found that the Union demonstrated a factual basis for its information request even without relying on the June 2002 and July 2003 accidents. It modified the judge's recommended order and substituted a new notice to conform with its findings.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Utility Workers Local 483; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Los Angeles on June 7, 2004. Adm. Law Judge William L. Schmidt issued his decision Aug. 26, 2004.

Vae Nortrak North America, Inc. (27-CA-18917-1; 344 NLRB No. 12) Pueblo, CO Feb. 4, 2005. The Board adopted the administrative law judge's recommendation and dismissed the complaint allegation that the Respondent violated Section 8(a)(3) of the Act by refusing to hire Sam Pantello. [\[HTML\]](#) [\[PDF\]](#)

It noted that the judge did not apply the framework for analysis of a refusal-to-hire case that the Board set forth in *FES*, 331 NLRB 9 (2000), *enfd.* 301 F.3d 83 (3d Cir. 2002). Although the judge applied slightly different standards in assessing the General Counsel's case, the Board found that his analysis comports with that of *FES*.

Contrary to their colleague, Chairman Battista and Member Schaumber found it unnecessary to resolve any ambiguities in the judge's credibility determinations because they found that the General Counsel did not meet his burden of proving, pursuant to *FES*, that antiunion animus contributed to the decision not to hire Pantello. They wrote: "Had the judge credited the testimony of the General Counsel's witnesses, the testimony demonstrated antiunion animus attributable only to Plant Manager Craig Fetty. . . . Fetty was not employed by the Respondent at the time the decision was made. . . . Under these circumstances, we agree with the judge that any antiunion attributed to Fetty would not have motivated the hiring decision as he had no part in it."

Member Liebman agreed with the judge that the General Counsel failed to meet his initial burden under *FES*, of showing that union animus contributed to the Respondent's decision not to hire Pantello. She relied solely on the judge's credibility resolution in favor of the Respondent's witnesses. Member Liebman disagreed with her colleagues' finding that, even if the judge had credited the General Counsel's witnesses, any union animus consequently attributed to Plant Manager Fetty against Pantello would not be imputable to Human Resources Director Dillard, who made the final decision not to hire Pantello.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Steelworkers Local 3405; complaint alleged violation of Section 8(a)(3). Hearing at Pueblo on July 20, 2004. Adm. Law Judge James L. Rose issued his decision Aug. 31, 2004.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Luce & Son, Inc. (Teamsters Local 533) Reno, NV January 28, 2005. 32-CA-21415; JD(SF)-5-05, Judge Albert A. Metz.

ACF Industries LLC (Steelworkers) Milton, PA February 1, 2005. 6-CA-33614; JD-5-05, Judge David L. Evans.

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

*(In the following cases, the Board considered exceptions to and
adopted Reports of Regional Directors or Hearing Officers)*

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Long Prairie Memorial Hospital and Home, Long Prairie, MN, 18-RC-17201,
February 1, 2005 (Chairman Battista and Members Liebman and Schaumber)

DECISION AND DIRECTION OF SECOND ELECTION

Vance Uniformed Protection Services, Inc., Washington, DC, 5-RC-15728, February 1, 2005
(Chairman Battista and Member Schaumber; Member Liebman concurring)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Florence Crittenton Center, Los Angeles, CA, 31-RC-8419, February 2, 2005
(Chairman Battista and Members Liebman and Schaumber)

DECISION AND ORDER DIRECTING HEARING [on Employer's objections]

Special Touch Home Care Services, Inc., Brooklyn, NY, 29-RC-10233, February 2, 2005
(Chairman Battista and Member Schaumber; Member Liebman dissenting)

DECISION AND ORDER REMANDING [for hearing on Employer's objections]

American Red Cross, Cleveland, OH, 8-RC-16640, February 2, 2005
(Chairman Battista and Member Schaumber; Member Liebman dissenting)

*(In the following cases, the Board adopted Reports of
Regional Directors or Hearing Officers in the absence of exceptions)*

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Elegant Stair and Rail, Inc., Waukegan, IL, 13-RD-2476, February 3, 2005 (Chairman Battista
and Members Liebman and Schaumber)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Duane Rede, Inc., New York, NY, 2-RC-22914, February 4, 2005 (Chairman Battista and
Members Liebman and Schaumber)
Nordstrom, Inc., Seattle, WA, 19-RD-3535, February 4, 2005 (Chairman Battista and
Members Liebman and Schaumber)

**DECISION AND DIRECTION [that Regional Director
open and count ballots]**

Metal Equipment of Puerto Rico, Inc., Cataño, PR, 24-RC-8420, February 4, 2005
(Chairman Battista and Members Liebman and Schaumber)

DECISION AND DIRECTION OF THIRD ELECTION

Curran & Co., Marquette, MI, 30-RC-6507, February 4, 2005 (Chairman Battista and
Members Liebman and Schaumber)
First Student, Inc., Anchorage, AK, 19-RD-3610, February 4, 2005 (Chairman Battista and
Members Liebman and Schaumber)

***(In the following cases, the Board denied requests for review
of Decisions and Directions of Elections (D&DE) and
Decisions and Orders (D&O) of Regional Directors)***

Co-Op Mine, Huntington, UT, 27-RC-8326, January 31, 2005 (Chairman Battista and Member Liebman; Member Schaumber dissenting)

Loudspeaker Components, LLC, Lancaster, WI, 30-RM-543, February 2, 2005
(Chairman Battista and Members Liebman and Schaumber)

Miscellaneous Board Orders

**ORDER [denying request for review of Regional Director's
scheduling the election for February 9, 10, and 11, 2005]**

Tyson Fresh Meats, Inc., Wallula, WA, 19-RD-3576, February 1, 2005 (Hollace J. Enoch)

**ORDER [granting Employer's request for review of Regional Director's
decision and direction of election with respect to the issue of whether
the ward secretary should be excluded from the unit and denying
request in all other respects]**

Britthaven of Edenton, Inc., Edenton, NC, 11-RC-6587, February 2, 2005 (Chairman Battista and Members Liebman and Schaumber)
